United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

with affidavit

76-6072

To be argued by
SAMUEL J. WILSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6072

UNITED STATES COURT OF APPEALS
FILED
JUL 29 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

In the Matter

—of—

WILLIAM ROBERT KLEIN a k a WILLIAM R. KLEIN,
An Attorney,

WILLIAM ROBERT KLEIN,
Appellant,

DAVID N. EDELSTEIN, Chief Judge, U.S.D.C., S.D.N.Y.,
Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for Respondent.

SAMUEL J. WILSON,
Assistant United States Attorney,
Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6072

In the Matter

—of—

WILLIAM ROBERT KLEIN a/k/a William R. Klein,
An Attorney,

WILLIAM ROBERT KLEIN,
Appellant,

DAVID N. EDELSTEIN, Chief Judge, U.S.D.C., S.D.N.Y.,
Respondent.

BRIEF FOR RESPONDENT

Preliminary Statement

Appellant has taken this appeal from an order of Chief Judge David N. Edelstein entered on September 25, 1974 striking appellant from the roll of attorneys admitted to practice before the United States District Court for the Southern District of New York. He also appeals from the District Court's denial in its opinion of February 2, 1976 of his application for an order vacating its prior order of disbarment and from the District Court's endorsement order filed March 19, 1976 in which it adhered to its opinion of February 2, 1976 as to appellant's application for reargument.

Pursuant to a written request from the respondent Chief Judge, the United States Attorney for the Southern District of New York appears herein as counsel for the respondent.

Issue Presented

Was the order of disbarment of the Appellant Division, Second Department of the New York Supreme Court a constitutionally sufficient basis for the entry of an order of disbarment from practice before the United States District Court for the Southern District of New York by that Court?

Prior Proceedings

(a) State Courts

Appellant was removed from the roll of attorneys admitted to practice before the United States District Court for the Southern District of New York by order of the Chief Judge entered on September 25, 1974. (1a)* This order in turn was based upon a prior disbarment order of the New York State Supreme Court, Appellate Division, Second Department, dated June 29, 1965 and entered pursuant to that Court's decision in *Matter of Klein*, 23 A.D.2d 356, 262 N.Y.S.2d 416 (1965). Because appellant's attack is based upon the alleged unconstitutionality of the state court proceeding upon which the Chief Judge of the District Court relied in entering the disbarment order, the history of those proceedings will be given in some detail here.

Disciplinary proceedings were commenced against appellant by petition filed in the Appellate Division, Second

---

* References "—a" are to Appendix for Appellant herein.

Department, on December 17, 1964. The petition alleged the following misconduct:

"(a) Respondent's contumacious refusals to answer questions as a witness on January 23, 1964 and on January 24, 1964 at the Additional Special Term of the Supreme Court, Kings County, violated his inherent duty and obligation as a member of the legal profession and his duty to be candid and frank with the Court; and defied and flouted the authority of the Court to inquire into and elicit information within respondent's knowledge relating to respondent's charges and the charges of his clients Ursini of alleged misconduct and corruption upon the part of members of the Judiciary and members of the Bar, and relating to his conduct and practices as a lawyer. By his contumacious refusals to answer the aforesaid questions the respondent hindered and impeded the Judicial Inquiry directed by this Court into the charges made by respondent and his clients as aforesaid.

"(b) That in addition to and wholly apart from respondent's contumacious refusals to testify, respondent wilfully and contumaciously obstructed and impeded the Additional Special Term by a course of conduct deliberately calculated to delay and mislead the Court sitting at such Additional Special Term, by his wilful failure to appear on November 21, 1963, as a witness under subpoena pursuant to the direction of the Justice presiding at such Additional Special Term, and by instructing his client, John R. Ursini, to refuse to testify as a witness when said John R. Ursini appeared before the Additional Special Term as a witness pursuant to subpoena.

"(c) In an action in the Supreme Court, County of Queens, respondent deceived the Court

and Lloyd's London, a third-party defendant therein, by preparing and serving a third-party summons and complaint in the name of William Weintraub, as attorney of record for the third-party plaintiff, when in fact William Weintraub had not been retained by third-party plaintiff to prosecute its action and the use of his name as such attorney was without the knowledge or consent of the said William Weintraub.

"(d) Respondent in or about October, 1961, solicited legal business of Harry L. Gilman and attempted to induce said Harry L. Gilman to discharge his attorneys in a pending action and to retain respondent in their stead.

"(e) Respondent in or about October, 1960, solicited legal business for Robert S. Long, an attorney, and attempted to induce Seville Iron Works, Inc., a corporation, to retain Robert S. Long as their attorney, in the prosecution of an action.

"(f) Respondent in or about October, 1961, when appearing for a party in pending litigation communicated upon the subject of the pending controversy with an adverse party to the litigation then represented by counsel without the knowledge or consent of the attorneys for said adverse party.

"(g) Prior to March, 1964, respondent had been retained as attorney for Fun Fair Park, Inc. In the period between March 8 and March 18, 1964, respondent aided in the preparation and filing of a petition by creditors in an involuntary bankruptcy proceeding in the District Court of the United States, Eastern District of New York, entitled "In the Matter of Fun Fair Park, Inc., Alleged Bankrupt,' and further aided the petition-

> ing creditors in the prosecution of the bankruptcy proceeding by rendering to them legal advice, and by preparing and delivering to such creditors legal papers which were executed and filed by them with the Clerk of said District Court. Following the aforesaid conduct by respondent, he thereafter appeared as attorney for the alleged bankrupt, and filed an answer to the petition of the creditors, denying certain allegations thereof based upon information furnished by him." (27a, n. 5)

The "Judicial Inquiry" referred to in the charges is the Judicial Inquiry on Professional Conduct in Kings County which was directed by order of the Appellate Division, dated October 1963, to inquire into and report on written charges made by appellant and his clients of alleged corruption of judges and attorneys. *Matter of Klein, supra*, 23 A.D. 2d at 357-58, 262 N.Y.S. 2d at 417.

On January 6, 1965, appellant filed an answer to the charges against him raising a number of defenses including challenges to the court's jurisdiction, allegations of malicious intent in bringing the proceedings and claims that the petition was insufficient notice of the charges to permit answer. This answer is more fully summarized in *Matter of Klein, supra*, 23 A.D. 2d at 359-60, 262 N.Y.S. 2d at 419. Because the answer did not deny any of the charges of the petition and because the court found appellant's defenses to be without merit, it determined that discipline was necessary and fixed the penalty as disbarment. *Id.*, 262 N.Y.S. 2d at 419-20. The order of disbarment was entered on June 29, 1965, and that is the order upon which the federal disbarment was based.

Thereafter, appellant moved to vacate the disbarment order and for permission to file an amended answer to the petition putting in issue its allegations and for a

hearing on the issues. By memorandum dated September 29, 1965, the Appellate Division granted appellant's motion to the extent of permitting him to serve an amended answer and referring the matter to Justice Walter R. Hart of the New York State Supreme Court to hear and report as to the issues raised by the petition and amended answer. *Matter of Klein*, 24 App. Div. 2d 726 (1965).

Appellant took appeals to the New York State Court of Appeals challenging the June 29, 1965 disbarment order and the September 29, 1965 order of the Appellate Division allowing an amended answer and referring the matter to the Justice to hear and report. The Court of Appeals granted his application for a stay of the hearing before the referee, pending the decision of the Court of Appeals, but denied appellant's application for a stay of the order of disbarment. *Matter of Klein*, 17 N.Y. 2d 729, 269 N.Y.S. 2d 978, 216 N.E. 2d 840 (1966). In its decision on the merits the Court of Appeals found that the "Appellate Division was warranted in ordering appellant's disbarment". *Matter of Klein*, 18 N.Y. 2d 598, 600, 272 N.Y.S. 2d 372, 219 N.E. 2d 194 (1966). The Court of Appeals noted that the order of disbarment was predicated solely on the charges in the petition for disbarment rejecting intimations in the Appellate Division's opinion that a charge not contained in the petition might have been a basis for the order. *Id.* Appellant's motion for reargument of the decision of the Court of Appeals was denied, *Matter of Klein*, 25 N.Y. 2d 735 (1969). Thereafter the Court of Appeals amended its remittitur to indicate that it had considered appellant's claims of denial of due process and equal protection and found them without merit. *Matter of Klein*, 26 N.Y. 2d 961, 311 N.Y.S. 2d 4, 259 N.E. 2d 476 (1970).

A petition to the United States Supreme Court for a writ of certiorari was denied, *sub nom.*, *Klein* v. *Klein*, 385 U.S. 973 (1966). Rehearing was denied, 385

U.S. 1032 (1967), as was a motion to file a second petition for rehearing, 388 U.S. 925 (1967).

In the hearing before the Justice designated in the Appellate Division's September 29, 1965 order, appellant withdrew from the proceedings after his objections to the Justice's qualifications to act and to the fact that the disbarment portion of the June 29, 1965 order had not been vacated were overruled. *Matter of Klein*, 28 A.D. 2d 538, 539, 279 N.Y.S. 2d 579, 580 (1967). The hearing continued in the absence of the appellant and Justice Hart filed a report finding four of the charges substantiated [(a) in part, (c), (f) and (g)] and the remaining three unsupported. The Appellate Division confirmed the Justice's findings in all respects and denied in all respects appellant's motion to vacate the order of disbarment of June 29, 1965. *Id.*

(b) United States District Court for the Southern District of New York

Pursuant to General Rule 5(d) of the rules of the United States District Court for the Southern District of New York, respondent entered the order disbarring appellant in that Court upon presentation of a certified copy of the Appellate Division's June 29, 1965 order. (1a). Upon appellant's application to the Court for an order vacating its order of disbarment and after consideration of the entire record of the state court proceedings and the arguments presented by appellant in his papers and in open court, the Chief Judge denied the motion. (20a).

The District Court found that the totality of the state court proceedings had resulted in a full opportunity to meet clearly defined charges. (23a-24a). It concluded that the state proceedings were not so offensive to due process as to bar a federal district court

from making them a basis for removal from its bar. (25a).

Relevant Rule

Rule 5. General Rules for the United States District Court for the Southern District of New York.

Discipline of Attorneys

* * *

(d) Any member of the bar of this court who shall be disciplined by a court in any State, Territory, other District, Commonwealth or Possession, shall be disciplined to the same extent by this court unless an examination of the record resulting in such discipline discloses (1) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not consistently with its duty accept as final the conclusion on that subject; or (3) that the imposition of the same discipline by this court would result in grave injustice; or (4) that the misconduct established has been held by this court to warrant substantially different discipline.

Upon the presentation to the court of a certified or exemplified copy of the order imposing such discipline, the respondent attorney so disciplined shall, by order of the court, be disciplined to the same extent by this court, provided, however, that within 30 days of the service upon the respondent attorney of the order of this court disciplining him, either the respondent attorney or a bar association designated by the chief judge in the order imposing discipline may apply to the chief judge for an order to show cause why the discipline imposed in this court should not be modified on the basis of one or more of the grounds set forth in this Paragraph (d).

* * *

ARGUMENT

The proceeding in the Appellate Division Second Department provided a constitutionally sufficient basis for the District Court's order of disbarment.

The District Court had jurisdiction to enter the challenged order of disbarment because a court which has power to admit attorneys to practice before it has inherent authority to disbar or discipline those attorneys for unprofessional conduct. *Matter of Abrams*, 521 F.2d 1094, 1099 (3d Cir.), *cert. denied*, — U.S. —, 44 U.S.L.W. 2041 (1975); *see* 28 U.S.C. § 2071, Rule 83 F.R. Civ. P., Rule 46 F.R. App. P., and Rules 3 and 5 of the General Rules of the United States District Court for the Southern District of New York. This Court has jurisdiction to review such a disciplinary order. *In re Patterson*, 176 F.2d 966, 967 (9th Cir. 1949); *Howard* v. *Wilbur*, 166 F.2d 884, 885 (6th Cir. 1948); *In re Chopak*, 160 F.2d 886, 887 (2d Cir.), *cert. denied*, 331 U.S. 835 (1947); *In re Schachne*, 87 F.2d 887 (2d Cir. 1937); *see Theard* v. *United States*, 354 U.S. 278 (1957). The disciplinary orders of a district court are only subject to reversal on appeal if the discipline assessed constitutes a clear abuse of discretion by the lower court. *Sacher* v. *Ass'n of the Bar*, 347 U.S. 388, 394 (1954) (dissenting opinion); *In re Sacher*, 206 F.2d 358, 361 (2d Cir. 1953), *rev'd sub nom., Sacher* v. *Ass'n of the Bar*, 347 U.S. 388 (1954); *In re Chopak, supra; In re Schachne, supra.*

The District Court had no authority to review or reverse the order of disbarment entered by the Appellate Division insofar as that order affected appellant's right to practice law in the state courts. *Selling* v. *Radford*, 243 U.S. 46, 50 (1917). The Appellate Division's order was not binding upon the District Court on the question

of disciplinary action in the federal court although it was entitled to a high degree of respect. *Id.; Theard* v. *United States*, 354 U.S. 278, 282 (1957); *In re Ruffalo*, 390 U.S. 544, 547 (1968). *But see Matter of Abrams, supra.* The Supreme Court has articulated the standard to be applied in determining what weight a federal court should give to a state court disciplinary order in the following terms:

> "... we should recognize the condition created by the judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1. That the state procedure from want of notice or opportunity to be heard was wanting in due process; 2, that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice we were constrained so to do." *Selling* v. *Radford, supra* at 51; *accord, Theard* v. *United States, supra* at 282.

These principles have been codified in the Southern District Court's General Rule 5(d) under which the order appealed from was entered. Pursuant to that rule, the Chief Judge examined the entire record of the Appellate Division's proceedings in response to appellant's motion to vacate the District Court's disbarment order. (20a)*

---

* The record of the state proceedings as examined by the District Court is reproduced in the Appellee's Addendum filed herewith.

That motion raised only the question of whether the procedures by which the Appellate Division order was issued met the applicable due process notice and hearing requirements. After according the appellant an opportunity to be heard,* the Court concluded that the totality of the state court proceedings had accorded him due process.

The District Court first analyzed the Appellate Division's proceedings which initially resulted in the June 29, 1965 disbarment order. It concluded that appellant had been denied constitutionally mandated notice of the charges against him by reason of the inclusion in the Appellate Division's opinion of reference to charges not included in the disciplinary petition served upon appellant. (22a-24a); *see In re Ruffalo, supra; Burkett* v. *Chandler*, 505 F.2d 217, 222 (10th Cir. 1974); *In re Jones*, 506 F.2d 527, 529 (8th Cir. 1974).

Having determined that the June 29, 1965 order was subject to constitutional infirmities, the Court then examined the subsequent state proceedings to determine whether these proceedings mitigated or cured the original error. It concluded that the *de novo* hearing before a state Supreme Court justice accorded appellant, followed by the report of the hearing officer to the Appellate Division, and appellant's participation in that proceeding, taken together with the Appellate Division's reconsideration and modification of its original findings and order, resulted in satisfaction of the constitutional duties owed to appellant. As the District Court noted in its opinion, any other result "would be a gross elevation of form over substance. . . ." (24a).

As the District Court noted in its endorsement order of March 19, 1976, the *de novo* hearing proceeded just as if it were the initial hearing prior to disbarment,

---

* The transcript of this hearing is also reproduced in the Appellee's Addendum filed herewith.

with the burden of proof upon the petitioner seeking disbarment. (48a). The only disadvantage that appellant suffered during the hearing and subsequent proceedings was that he remained under the disbarment order. This was an economic disadvantage at best and not one which could have had a significant impact upon the proceedings. It is worthy of note that any stigma attaching to the appellant cannot be assumed to have influenced the experienced member of the Bench who presided at the hearing. (31a, n.21). If remand without vacation of the order of disbarment is a valid procedure to correct defects concerning procedural rights in the federal courts then it must be a sufficient corrective when employed by state courts. *See In re Jones*, *supra* at 529 (8th Cir. 1974). The *de novo* hearing and reconsideration by the Appellate Division in light of the findings of the hearing officer (30a, n.17) accorded appellant sufficient due process so that he was properly disbarred in the federal district court based upon those proceedings. *Cf. Armstrong* v. *Manzo*, 380 U.S. 545 (1965); *Huntley* v. *North Carolina State Bd. of Educ.*, 493 F.2d 1016 (4th Cir. 1974).

CONCLUSION

For the foregoing reasons the District Court's order disbarring appellant should be affirmed.

New York, New York
July 25, 1976

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for Respondent.

SAMUEL J. WILSON,
Assistant United States Attorney, Of Counsel.

★ U. S. Government Printing Office 1976-- 614—350—174

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 76-6072

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 28th day of July, 19 76 she served 2 copys of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

William Robert Klein,
118-21 Queens Blvd.
Forest Hills, NY 11575

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

28th day of July, 19 76

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977